United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 994

Case No. 1038: OKUOME

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 12 November 1997 and 21 April 1998, Andrew Adipo Okuome, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 August 1998, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

"II. PLEAS

1. ... [M]y dismissal ignored due process procedure as laid down by staff rule 110.4 and UNICEF's own Administrative Instruction CF/AI/1990-5 of 17th September 1990, para. 4.1 (a) and I therefore plead it should be rescinded ... [M]y suspension violated the requirements in staff rule 110.2 under which I was suspended. The irregular suspension prejudiced my defence. (...)

2. Based on the fact that UNICEF misused staff rule 110.2 under which my suspension was effected without following the procedure as laid down in that staff rule I plead that my suspension and subsequent dismissal was ill motivated, biased,

prejudiced, based on mistaken facts, violated due process and [was] discriminatory and I therefore plead that it is nullified.

3. ... [S]taff rule 110.4 and UNICEF Administrative Instruction CF/AI/1990-5 referred to above, in particular, required UNICEF to share with me documents ... UNICEF failed to do this ... UNICEF [New York Headquarters] insisted I was given the documents which I did not get and UNICEF Regional Office also stated, in their letter of 3rd August 1995 ... that I did not get the documents ... I therefore plead that UNICEF should state and produce who gave me the documents instead of confusing situation by contradicting their own Regional Office which was dealing with the case. This being the case I plead the dismissal is nullified.

4. Under staff rule 109.10 (a) (v) ... [the] cut off date for payment of salary, allowance and benefits is the date of dismissal. I plead that UNICEF is ordered to pay me up to 10th April 1996. My dismissal date was 11th April 1996 ... I kindly request for an immediate order on this before hearing my case ...

5. Noting the gravity and the financial injury UNICEF subjected me to over a long period ensuring all actions on my case were severely delayed and that justice delayed is justice denied, I plead that compensation to me should be not less [than] five years of base salary and allowances. I was suspended for 17 months instead of 3 allowed.

6. ... [T]ermination of my service without following due process was harsh, cruel and inconsiderate and the damage I suffered as a result of negative press publications [is] irreparable hence my plea that I should be paid five years salary."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the Applicant filed Written Observations on 17 October 2000 and on 8 June 2001;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF at the Kenya Country Office on 1 November 1989 as an Assistant Administrative and Finance Officer at the NO-B level, on a six-month fixed-term appointment. He was promoted to the position of Administrative and Finance Officer at the NO-C level on 1 January 1990. On 1 November 1993 he was granted a permanent appointment. He was summarily dismissed effective 11 April 1996.

On 14 December 1994, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, notified the Applicant that, pending completion of an audit of the Kenya Country Office he was being suspended with full pay. As the preliminary findings suggested serious mismanagement and

possibly fraud within the office, the reason given for the suspension was to avoid interference, "intentional or unintentional, with the activities of the auditors or of their access to evidence".

On 3 May 1995, the Director, Division of Personnel, UNICEF, transmitted a copy of the Internal Audit Report dated 20 April 1995, to the Applicant, and advised him that he was being charged with serious misconduct and suspended without pay. The Audit Report concluded, *inter alia*, that the Applicant had been grossly negligent, had allowed irregular financial activities to take place for his own personal benefit and had been implicated in extorting money from other staff members.

On 16 May 1995, the Applicant requested a series of documents he claimed were necessary in order to prepare his defense. On 9 June 1995, the Applicant replied to the charges against him and complained that he had not given access to all the documents requested. On 28 June and 3 August 1995, he received additional documents. He submitted his reply on 7 August 1995.

On 25 March 1996, the Applicant was informed that the Executive Director had decided to dismiss him for serious misconduct in accordance with the second paragraph of staff regulation 10.2.

The Applicant requested review of the decision, on 7 June 1996. On 5 March 1997, the Director, Division of Human Resources, UNICEF, advised the Applicant that his request had been referred to an *ad hoc* Joint Disciplinary Committee (JDC) constituted at Headquarters.

By memorandum on 19 September 1997 the JDC reported its findings and conclusion to the Executive Director which read, in part, as follows:

> "**(1) Approval of Fraudulent Disbursement**
>
> ...
>
> The JDC notes that while the Appellant does not deny that these disbursements were highly irregular, he refuses to take any responsibility for having approved them. While it is true that these disbursements should have been checked at every level, this does not excuse him from his own gross negligence.
>
> **(2) Overpayment to Suppliers**
>
> ...

[The] JDC notes that as Finance Officer, the Appellant should have denied, or at least questioned, payments without correct supporting documentation. By not doing so, the Appellant demonstrated a serious lack of competence in the performance of his duties.

**(3) MIP Falsifications**

...

The JDC notes that the Appellant is not accepting the responsibility that comes with his role as Financial Officer. If he had the slightest suspicion that these claims were not genuine, he should have investigated further and advised the Representative. While the Appellant may not have profited personally from these fraudulent transactions, his acceptance and consequent certification of these claims constitutes gross negligence on his part.

**(4) Irregular Opening of Local Bank Accounts**

...

The JDC notes that the normal procedure would be a wire transfer from bank account to bank account or a request to open a new bank account, and that while the Appellant may not have personally profited from this transaction, the method used was highly irregular and against proper procedure. The JDC also notes that the Appellant took this action despite having been told by the Auditors in 1994 to discontinue this practice.

**(5) Replenishment of Sub-Office Bank Accounts**

... The JDC notes that despite being told in 1994 by the Auditors that he must follow the correct procedures, the Appellant continued this irresponsible practice.

**(6) Improper Use of PAR System**

...

The JDC notes that ... the Appellant, as Finance Officer, at a minimum, should have put in place sufficient internal controls so that he does not personally handle his own PAR account. This practice clearly contravenes UNICEF rules. The Appellant should also, at a minimum, have alerted the Auditors to the chaotic state of the PAR system; his failure to do so constitutes negligence.

**(7) Other Charges**

Two other charges, one referring to **Travel Activities**, and the other, to **Obstruction of Audit**, were also discussed extensively. The general conclusion remains that the

Appellant's conduct shows total abnegation of the financial control which is a key function of his post. At a minimum, the Appellant was irresponsible and grossly negligent.

**Conclusion**

It is regrettable that there has been such a long period from when the Appellant was actually charged (May 1995) to the time of his actual dismissal (March 1996). The unusual workload brought on by the KCO [Kenya Country Office] audit obviously explains but hardly justifies this delay. In the actual charges brought against the Appellant, the *ad hoc* JDC discerns a clear pattern of gross negligence and misconduct. In conclusion, we advise the Executive Director that no further review of this case is warranted."

On 8 October 1997, the Executive Director, UNICEF, transmitted to the Applicant a copy of the *ad hoc* JDC report and informed him as follows:

"...

I have re-examined the decision to summarily dismiss you in light of the Committee's report and have taken note of its conclusion that no further review of your case is warranted. I have decided to accept the Committee's recommendation and to maintain your summary dismissal."

On 27 August 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The suspension and subsequent dismissal were ill motivated, biased, prejudiced, based on mistaken facts, discriminatory and in violation of due process.

2. UNICEF failed to comply with the Staff Regulations and Rules. The suspension letter failed to specify the regulation under which it was administered.

3. UNICEF failed to supply the Applicant with the pertinent documents necessary to prepare and present a proper defense.

4. The long delay in disposing of the Applicant's case constituted a denial of justice and a violation of the Staff Regulations and Rules, requiring rescission of the decision to dismiss the Applicant.

5. The *ad hoc* JDC ignored the Applicant's defense.

6. The applicable rules mandate that the cut-off date for payment of salary, allowance and benefits is the date of dismissal.

Whereas the Respondent's principal contentions are:

1. The Executive Director of UNICEF has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting summary dismissal. Her decision to summarily dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive or procedural irregularity, improper motive, or any other extraneous factor.

2. The Applicant failed to meet the standard of conduct required of international civil servants.

3. The Applicant's rights of due process were respected.

4. The Applicant is not entitled to salary payments from 3 May 1995, the date on which he was suspended from service, until the date of his summary dismissal.

The Tribunal, having deliberated from 2 to 13 July 2001, now pronounces the following judgement:

I. The Applicant appeals the decision to dismiss him summarily from service for serious misconduct. The Applicant claims that his summary dismissal was improperly motivated, procedurally deficient, discriminatory in nature, and taken in disregard of his rights of due process and the procedures set forth the Staff Regulations and Rules.

II. The case concerns the imposition of a disciplinary sanction. In its longstanding jurisprudence on the issue of disciplinary measures, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and … its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision". (See Judgements No. 210, *Reid* (1976), para. III; and No. 300, *Sheye* (1982), para. IX.) In disciplinary cases, the Tribunal examines

(i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct or misconduct, (iii) whether there has been substantive irregularity, (iv) whether there was an improper motive or abuse of discretion, (v) whether the sanction is legal, and (vi) whether the sanction imposed was disproportionate to the offense. (See Judgements No. 890, *Augustine* (1998); and No. 941, *Kiwanuka* (1999).)

III. On 14 December 1994, on the basis of preliminary findings of an audit investigation of the Kenya Country Office, Ms. Sham Poo, the Deputy Executive Director, UNICEF, notified the Applicant that he was being suspended with full pay, pending completion of the audit investigation. Subsequently, on 3 May 1995, upon completion of the audit investigation, the Applicant was provided with the Internal Audit Report. Based on the findings contained in the Report, the Applicant was charged with serious misconduct and suspended without pay. Effective 11 April 1996, the Applicant was summarily dismissed.

The case was submitted to an *ad hoc* JDC, which found that the Applicant's conduct "showed abnegation of the financial control which [was] a key function of his post" and that "[a]t a minimum, the [Applicant] was irresponsible and grossly negligent".

Based on the recommendation of the JDC, the Executive Director, UNICEF, decided to maintain the Applicant's summary dismissal.

IV. The Applicant claims that the case should have been referred to the JDC prior to his summary dismissal. This is not supported by staff rule 110.4 (b), which provides that no advice of a JDC shall be required, "in respect of summary dismissal ... in cases where the seriousness of the misconduct warrants immediate separation from service". Furthermore, the Tribunal has rejected the argument that cases involving summary dismissal for serious misconduct must be referred to the JDC, and has confirmed that "neither staff regulation 10.2 nor staff rule 110.3 (a) require such a referral". (See Judgement No. 424, *Ying* (1988), para. XII.)

Furthermore, the Tribunal has consistently held that an applicant bears the burden of proving prejudice or other improper motive. (See Judgements No. 465, *Safavi* (1989); No. 479, *Caine* (1990) and No. 515, *Khan* (1991).) In this case, the Applicant did not submit any proof that the review process was vitiated by procedural irregularity and, therefore, did not meet his burden.

V. The Applicant contends that he is entitled to receive a salary, allowances and benefits from the date on which he was suspended without pay until the date of his summary dismissal. According to staff rule 110.2 (c), "[i]f a suspension ... is without pay and the charge of misconduct is subsequently not sustained, any salary shall be restored". The Tribunal finds that, as the Applicant was summarily dismissed for serious misconduct, he has no right to have his salary restored. In addition, the Tribunal finds that, while a decision to suspend a staff member without pay is a harsh measure, in light of the exceptional circumstances of this case such a decision fell within the discretion of the Executive Director. Therefore, the Applicant's claim on these grounds fails.

VI. The Applicant claims that his suspension from 14 December 1994 until his summary dismissal on 11 April 1996 violated the three-month limit imposed by staff rule 110.2, since he was suspended for nearly 17 months. The Tribunal notes that the Applicant was initially suspended with full pay but that from 3 May 1995, the date on which he was charged with misconduct, until 11 April 1996, he was suspended without pay. Staff rule 110.2 stipulates that a "staff member may be suspended from duty during investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months". The Tribunal has held that "although the staff rule speaks of suspensions 'normally' not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires", and "[i]t is entirely proper for the Organization to be alerted to the possibility or the appearance of ... corrupt practices, ... and to investigate fully whenever it appears that such misconduct may have occurred". (See Judgement No. 615, *Leo* (1993).)

The Respondent claims that, as the charges in this case were of a serious nature and were sufficiently documented to constitute "exceptional circumstances" within the purview of staff rule 110.2, suspension without pay was appropriate in this case. The Tribunal has stated, "in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances". (See Judgement No. 941, *Kiwanuka* (1999).) While the Tribunal finds that the allegations of serious misconduct warranted a thorough investigation, and notes that the findings of the audit investigation led to the suspension of 25 staff members in addition to the Applicant, it finds that the time taken to complete the disciplinary proceedings was exaggerated and unduly prolonged. The fact that 25 other staff members were

involved does not justify keeping the Applicant without means of support for such a lengthy period of time.

VII. In conclusion, the Tribunal holds that the Executive Director of UNICEF exercised reasonable and necessary discretion under the Staff Rules by concluding that the Applicant failed to meet the highest standards of integrity required by a staff member and that his conduct constituted serious misconduct. Further, the Tribunal holds that the Secretary-General did not violate the Applicant's due process rights by summarily dismissing him. However, in light of the Respondent's prolonged delay in concluding the disciplinary proceedings while keeping the Applicant suspended without pay, the Tribunal awards the Applicant compensation of three months net base salary.

VIII. In view of the foregoing, the Tribunal:

(i) Orders the Respondent to pay the Applicant compensation of three months net base salary at the rate in effect on the date of his separation from service.

(ii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 16 July 2001

Maritza STRUYVENBERG
Executive Secretary